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Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act

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Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act

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I. INTRODUCTION

The Voting Rights Act¹ celebrates its fortieth birthday this year. Like many forty-year-olds, the Act must confront a mid-life crisis. In less than two years, several of its key provisions will expire.² Perhaps the most important of these expiring provisions is the preclearance mechanism of section 5,³ a provision that has previously been hailed as the "heart of the Voting Rights Act."⁴

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1. 42 U.S.C. § 1973 (2000).

2. Among the provisions scheduled to expire are: (1) section 203, which mandates that certain places provide access to the electoral process for persons who speak languages other than English; (2) section 8, which allows the federal government to observe election-day polling place activity and ballot counting in certain places; and (3) section 7, which allows the federal government to oversee the voter registration process in certain places. See *id.* § 1973aa-1a (section 203); *id.* § 1973f (section 8); *id.* § 1973e (section 7).

3. *Id.* § 1973c.

4. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1419 (1991).

Into this mid-life crisis steps Professor Samuel Issacharoff, who recently penned an important and meaningful contribution⁵ to the emerging dialogue⁶ over the extension of the preclearance requirement beyond its expiration in the summer of 2007.⁷ In his work, Professor Issacharoff takes a stern, skeptical look at section 5, daring to question its current usefulness. And this represents no small step coming from a member of the generally liberal academic community,⁸ where there tends to be too much willingness to criticize any steps that might be taken to modernize or scale back civil rights statutes to account for changed circumstances.⁹ In that sense, Professor Issacharoff lends an important, well-respected voice of reason to what one surmises will soon be a chorus of academic and civil rights literature attempting to prove that, not only should section 5 be extended, it should be amended to restore some of the power to the federal government that the Supreme Court has rescinded in the past decade.¹⁰

In my view, there should be little debate about some of Professor Issacharoff's core propositions. It's not 1965 anymore.¹¹ Racial and ethnic minorities, whether African-American, Latino, Asian, or Native American, no longer find themselves blocked at every turn from registering and casting ballots.¹² Blatant and despicable discrimina-

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5. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).
 6. Compare John Lewis, *Keeping the Polls Open*, N.Y. TIMES, Aug. 6, 2005, at A13 (advocating the extension of section 5), with Abigail Thernstrom & Edward Blum, *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10 (advocating the elimination of section 5).
 7. 42 U.S.C. § 1973b(a)(8) (setting the expiration date for section 5).
 8. See George F. Will, *Academia, Stuck to the Left*, WASH. POST, Nov. 28, 2004, at B7 (describing how academics are far more liberal than the public-at-large).
 9. See, e.g., Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1998) (stridently criticizing the Rehnquist Court's voting rights jurisprudence).
 10. See, e.g., Vernon Francis et al., *Preserving a Fundamental Right: Reauthorization of the Voting Rights Act*, (Lawyer's Committee for Civil Rights Under Law), June 2003, at 10 (arguing that section 5 should be amended to restore a substantive standard involving a test for unconstitutional discriminatory purpose); see also Jocelyn Benson, Note, *Turning Lemons into Lemonade: Making Georgia v. Ashcroft the Mobile v. Bolden of 2007*, 39 HARV. C.R.-C.L. L. REV. 485 (2004) (arguing that Congress should amend section 5 to restore a substantive standard for discriminatory effect recently abandoned by the Supreme Court); India Autry, *Voting Act Gets Early Lift from House*, N.Y. NEWSDAY, July 19, 2005, at A35, available at <http://www.newsday.com> (noting that the NAACP "want[s] to see greater enforcement" of section 5 and "that there also may need to be additional provisions [to the Act] in order to secure the votes of minorities").
 11. Issacharoff, *supra* note 5, at 1712-14 (describing how one of the preconditions for the success of section 5 was "the urgency and extent of the harm to which Congress addressed itself" and how "[n]o longer are blacks political outsiders in the covered jurisdictions").
 12. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1833-34 (1992)

tion no longer occurs on the widespread level at which it occurred four decades ago, and these changes in the electoral landscape don't just relate to the formal act of registering and casting ballots—a substantial number of minority faces now roam the halls of Congress, state legislatures, and in county seats and city halls.¹³ To be sure, our Nation is by no means a society where voting-related discrimination against racial and ethnic minorities never occurs,¹⁴ but our society today most certainly does not engage in anything approaching the widespread and rampant discrimination practiced between the post-Civil War Redemption and passage of the Voting Rights Act.¹⁵

Because it's not 1965 anymore, surely it's within the bounds of rational discourse to contend that a compelling reason no longer exists to keep the same "unique and stringent"¹⁶ remedy that section 5 provides in place past 2007. Section 5, as currently written, represents an extraordinary mechanism in our law, as it bars certain (primarily Southern) state and local governments,¹⁷ commonly known as the "covered jurisdictions," from implementing even the most minor¹⁸ of

("A quarter century of federal policing of the electoral processes has markedly transformed the political landscape. Gone are the poll taxes, the literacy tests, and the other overt barriers to voter registration."); *see also* Richard H. Pildes, *Less Power, More Influence*, N.Y. TIMES, Aug. 2, 2003, at A15 (describing how the South has "vastly changed" since initial passage of the Voting Rights Act).

13. DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2000, at 5 (2002) (noting that in 1968 there were 1,469 African-American elected officials while in 2000 there were 9,040 such officials); National Association of Latino Elected Officials, Membership, <http://www.naleo.org/membership.htm> (last visited November 11, 2005) ("In 1984 there were 3,128 Latino elected officials and as of January 2004, there were 4,853."); Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41, 49 (2002) (noting that in 1978 there were 120 Asian-American elected officials in "key positions" and that in 2000 there were 309 such officials).
14. For an example of present-day discrimination, see *United States v. Berks County*, 250 F. Supp. 2d 525, 527 (E.D. Pa. 2003) (describing poll workers' patently hostile treatment of Latino voters).
15. *See City of Rome v. United States*, 446 U.S. 156, 182 (1980) (describing the history of voting discrimination between the conclusion of the Civil War and the passage of the Voting Rights Act).
16. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1250 (1989).
17. Section 5 applies to all or parts of sixteen states. The States of Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered in their entirety; parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota are also covered. 28 C.F.R. pt. 51 (2004).
18. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565–66 (1969) (noting how Congress intended to reach even "minor" alterations in the election laws of those jurisdictions covered by section 5).

voting changes without federal approval.¹⁹ That federal approval—which can be obtained through a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia or, as is most common, from the United States Attorney General²⁰—only comes after the covered jurisdiction meets its burden²¹ of proving the absence of a retrogressive purpose or effect.²² Put another way, federal approval only comes after a state or local government demonstrates that, under the totality of the circumstances, minorities have not been placed in a worse position than they were in prior to the change²³ and that the state or local government did not intend to put minority voters in a worse position.²⁴ All this amounts to stiff medicine.²⁵ So, a few commentators (myself included) have already recognized the need to amend section 5, whether for policy reasons or to satisfy a Supreme Court with an inclination toward limiting Congress' ability to impose civil rights remedies on state and local governments.²⁶

Had Professor Issacharoff merely described the modern electoral landscape and then set forth some ideas to update section 5, you would not be reading this response. But he goes further, strongly im-

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19. *Clark v. Roemer*, 500 U.S. 646, 652–53 (1991) (“If voting changes subject to [section] 5 have not been precleared, [section] 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.”).
 20. 42 U.S.C. § 1973c (2000) (delimiting the two methods by which a jurisdiction covered by section 5 can garner federal approval); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, ABOUT SECTION 5 OF THE VOTING RIGHTS ACT, INTRODUCTION TO SECTION 5, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Nov. 11, 2005) (recognizing that “[w]ell over 99 percent of the changes affecting voting are reviewed administratively . . .”).
 21. 28 C.F.R. § 51.52(a) (2004) (“The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance . . .”); *Wilkes County v. United States*, 450 F. Supp. 1171, 1177 (D.D.C. 1978) (“In an action for a declaratory judgment under Section 5, the burden of proof is on the plaintiff [jurisdiction].”).
 22. 42 U.S.C. § 1973c.
 23. *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003) (delimiting the standard for proving discriminatory effect under section 5).
 24. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341 (2000) (delimiting the standard for proving discriminatory purpose under section 5).
 25. James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1263 (1994) (“From a federalism perspective, the preclearance mechanism is surely stiff medicine.”).
 26. See Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 249–68, 277–88 (2003) (describing the potential problems for the constitutionality of section 5 if Congress chooses to extend it and suggesting possible revisions); Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 814 (2003) (describing possible amendments to section 5 in order to satisfy the Court).

plying,²⁷ though perhaps not definitively concluding,²⁸ that section 5 may deserve to go the way of the Independent Counsel²⁹ and be sent to the scrap heap in its entirety.

In the interest of brevity and at the risk of oversimplification (and knowing most readers can easily peruse his thoughts in the original), it seems fair to characterize Professor Issacharoff as focusing on the circumstances surrounding and the litigation involving statewide, post-2000 Census redistrictings undertaken in Georgia and New Jersey³⁰ to make three core points: first, that there appears to be no compelling reason for the law to treat minority voters in New Jersey, a state *not* covered by section 5, differently from minority voters in Georgia, a state subject to section 5 coverage;³¹ second, that the Supreme Court's recent decision in *Georgia v. Ashcroft*³² leaves section 5 with an unadministrable substantive standard for judging retrogression of minority voting rights and that combining an unadministrable standard with the emergence of political competition between the Republican and the Democratic Party in the covered jurisdictions allows section 5 to more easily be used as a tool for partisan manipulation by politicians in Washington;³³ third, that for these reasons, section 5 should be ended, not mended.

27. Issacharoff, *supra* note 5, at 1714 (describing how "it is increasingly difficult to discern the positive role that the extraordinary powers of section 5 now play"); *id.* at 1731 ("The emerging conclusion is that section 5 has served its purposes and may now be impeding the type of political developments that could have been only a distant aspiration when the VRA was passed in 1965.").

28. In fairness, at certain points in his essay, Professor Issacharoff seems to back off the proposition that section 5 should be entirely scrapped, indicating that perhaps it only needs to be eliminated when it comes to "matters of extreme partisan concern, such as redistricting." *Id.* at 1731 ("This Essay further suggests that the combination of an administratively complex standard emerging from *Ashcroft* together with the strengthened world of partisan competition has called into question the continued utility of administrative preclearance—or at least of preclearance in the world of first-order political decisions such as redistricting.") (emphasis added).

29. See Robert Suro, *As Special Counsel Law Expires, Power Will Shift to Reno*, WASH. POST, June 30, 1999, at A6 (noting the expiration of the independent counsel law).

30. Issacharoff, *supra* note 5, at 1720–27 (engaging in a detailed discussion of statewide redistrictings in Georgia and New Jersey).

31. *Id.* at 1728 (positing that "there appears to be little reason to believe that the law should continue to treat blacks in Georgia distinctly from blacks in New Jersey").

32. 539 U.S. 461 (2003).

33. Issacharoff, *supra* note 5, at 1730 (noting that "so long as the South was solidly Democratic, there was little partisan gain available from controlling the levers of preclearance"). I should note that Professor Issacharoff never explicitly ties the Georgia Court's creation of a less administrable standard for section 5 into the potential for partisan misuse; however, I think he makes this point implicitly. See *id.* at 1728–31; see also Meghann E. Donahue, Note, "The Reports of My Death Are Greatly Exaggerated": Administering Section 5 of the Voting Rights Act After *Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651, 1683 (2004) (suggesting that

In responding to Professor Issacharoff's core ideas, it is not my purpose to engage in a *carte blanche* defense of the section 5 status quo. However, I would respectfully suggest that, at a minimum, Professor Issacharoff places too much emphasis on section 5's relevance to congressional and statewide redistricting while neglecting the impact of section 5 on local government. Sure, congressional and statewide redistricting grabs the headlines, particularly inside the Beltway. As a former practitioner with the Voting Section of the Department of Justice, I can attest to the excitement generated at a dinner party by a discussion of North Carolina's "bug splattered on a windshield"³⁴ congressional redistricting plan while yawns need to be stifled when discussing the Attorney General's section 5 determination involving an annexation in some small South Carolinian town.³⁵ It also doesn't help that, in recent years, the Supreme Court seems to have most often gotten itself enmeshed in litigation involving congressional and statewide redistrictings, making it seem like that's the bulk of the ballgame for section 5.³⁶ In reality, it is not. The first aim of this Article then is to distinguish between congressional and statewide redistricting and the protection needed for minority voters at the local level, contending that protection of minority voting rights in local government represents section 5's most important modern-day function and that local government may not implicate many of the issues Professor Issacharoff raises in relation to congressional and statewide redistricting.

After distinguishing between state and local voting changes, I will then tackle the question "if Georgia, why not New Jersey?"³⁷ What I will argue is that Georgia's history of voting-related discrimination, both ancient and recent, markedly differs from New Jersey in such a way as to provide sufficient justification to continue to apply section 5 to Georgia's congressional and statewide redistrictings. In addition, I will argue that, at the state level, racially polarized voting is greater

the "specter of increased inquiries into the partisan motives of redistricting plans and the partisan compositions of covered jurisdictions [under *Georgia*] could make section 5 review increasingly dependent on the partisan affiliation of the administration in power").

34. *Political Pornography II*, WALL ST. J., Feb. 4, 1992, at A14.

35. See Letter from R. Alexander Acosta, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to The Honorable H. Bruce Buckheister, Mayor (Sept. 16, 2003) (on file with the NEBRASKA LAW REVIEW) (objecting to annexations in the town of North, South Carolina).

36. In the 1990s round of redistricting, the Court decided several high-profile cases related to congressional and statewide redistricting, a number of which implicated the Attorney General's administration of section 5. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 911–13 (1996) (detailing the role of section 5 in the creation of majority-minority districts); *Miller v. Johnson*, 515 U.S. 900, 905–08, 921–27 (1995) (detailing the role of section 5 in the creation of majority-minority districts).

37. See *supra* note 31 and accompanying text.

in Georgia than New Jersey. Importantly, a recognition of these differences does not lead inexorably to the conclusion that Georgia should be saddled with a post-2007 version of section 5 that mirrors the current version. Nor should one conclude that there are no localities in Georgia that should be removed from section 5 coverage and, conversely, that there are no localities in New Jersey that should be added to the section 5 fold. It's just to say that Georgia's history and racially polarized voting provide justification for continuation of a more limited version of section 5 beyond 2007.

Then there's partisanship. Professor Issacharoff correctly recognizes that partisanship could hamper the fair administration of section 5, particularly when the Court has carved out a less than clear standard for section 5 decision-making. But he overstates the partisanship problem. Essentially two partisanship problems could occur in the Attorney General's administration of section 5. The first occurs when one major political party controls Washington and the opposing major political party controls the state process. In this instance, the political party in Washington could intransigently withhold preclearance for the purpose of compelling the state political party to adopt a voting change, such as a redistricting plan, contrary to the state political party's interests. The second occurs when one political party controls both Washington and the state government. Under this scenario, officials in Washington could collude with state officials to allow the adoption of a voting change that harms minority voters. Yet, despite the theoretical potential for both types of partisan actions, section 5, even as currently written, provides adequate legal and political safeguards to prevent all but the most marginal of partisan decision-making.

II. THINK LOCALLY

Put simply, Professor Issacharoff identifies several shifts in the electoral landscape that, in his view, call into question the need for section 5. Among those shifts is the fact that the political dynamic in states covered by section 5 no longer features an omnipotent, unchallenged, white Democratic Party establishment that seeks to entirely shut African-Americans out of the electoral process;³⁸ that there are a number of minority elected officials in the states currently covered by section 5 who have adequate power to look out for their own inter-

38. Issacharoff, *supra* note 5, at 1713–14 (describing how an unchallenged Democratic Party “was organized around the principle of resistance to any encroachments on Jim Crow” and was “immune to the pressing claims of black citizens” but that today “[n]o longer are blacks political outsiders in the covered jurisdictions”).

ests³⁹ and who should be allowed to freely form coalitions with white Democrats;⁴⁰ and that, with the advent of a competitive Republican Party in these states and the Supreme Court's *Georgia* decision—which creates a fuzzier, more malleable standard for determining whether a redistricting runs afoul of section 5—section 5 has become ripe for partisan manipulation by officials in Washington.⁴¹

To arrive at his conclusions, Professor Issacharoff concentrates on what occurred during recent statewide redistrictings in Georgia and New Jersey.⁴² By doing so, he fails to make an observation that, to be fair, has not previously been focused upon to any great extent in the academic literature. That observation is that section 5 (and indeed the Voting Rights Act as a whole) has had its greatest impact, success, and necessity at a much less sexy level of government—the local level.

The significance of section 5 on the local level can pretty plainly be demonstrated by reviewing the activity of the Attorney General, who serves as the primary actor in the administration of section 5.⁴³ The number of changes submitted by local governments, be they counties, cities, school districts, or other political bodies, far outpaces the number of submissions from state governments. A case in point is redistrictings, as section 5 review applies to a far greater number of local than congressional and statewide plans.⁴⁴ Indeed, the importance of section 5 to the local level becomes even clearer when looking at the number of voting changes that the Attorney General, by interposing an objection, has prevented from being implemented. Between January 1, 2000, and January 1, 2005, the Attorney General interposed forty objections, and in thirty-seven of those instances the objection involved a change made by a local, not state, entity.⁴⁵ Unsurprisingly,

39. *Id.* at 1714 (“As the responsiveness of Southern legislatures to claims of minority representation reveal . . . the Southern political process is highly attuned to black political claims.”).

40. *Id.* at 1728 (“Put bluntly, why should black voters of Georgia not be permitted the same degree of political opportunity to form coalitions as black voters of New Jersey?”).

41. See *supra* note 33 and accompanying text; accord Heather K. Gerken, *Lost In the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 514 (2004) (suggesting that Justice Souter had “well-placed concerns about the manageability” of the *Georgia* approach).

42. See *supra* note 30 and accompanying text.

43. See *Lopez v. Monterey County*, 525 U.S. 266, 281 (1999) (describing the Attorney General’s prominent role in the implementation of section 5).

44. See Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in *RACE AND REDISTRICTING IN THE 1990s* 80, 88–94 (Bernard Grofman ed. 1998) (describing how, between 1991 and 1995, the Attorney General received submission of 2,822 redistricting plans and how only eighty-three of those submissions involved statewide plans).

45. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, ABOUT SECTION 5 OF THE VOTING RIGHTS ACT, SECTION 5 OBJECTIONS, http://www.usdoj.gov/crt/voting/sec_5/obj_ac-

local objections also far outnumber state objections throughout the entire history of section 5 enforcement.⁴⁶

Numbers alone, however, never display the total picture. The importance of section 5 to the local level of government—particularly to the types of voting changes, such as redistrictings, that might dilute⁴⁷ minority voting strength—lies in the unique political dynamic that occurs at the local level as opposed to the political dynamic of congressional and statewide redistricting. On the local level, fewer minority elected officials serve on governing bodies; one-party, and even non-party, politics occurs with higher frequency; and the more indeterminate portions of the *Georgia* standard are less likely to come into play.

Yet before discussing the differences in state and local dynamics, it is important to recognize section 5's most important modern-day function: deterrence.⁴⁸ Gone are the days when section 5 was used, as it was in the 1980s and 1990s rounds of redistricting, to force the implementation of voting changes that would improve the position of racial minorities in relation to the existing, or benchmark, situation.⁴⁹ In very crude terms, this means section 5 can no longer be used to force covered jurisdictions to draw more majority-minority districts than exist presently. So what section 5 achieves today is a strong measure of insurance toward making state and local government officials think twice before enacting voting changes with the potential to negatively impact minority voters. Having looked at literally hundreds of redistrictings submitted to the Attorney General, I can attest⁵⁰ to the fact that the documents provided by local officials—whether they be meeting minutes or descriptions of redistricting criteria—amply demonstrate that local officials and their demographers are acutely cognizant of the standards for approval and typically try to steer very

tiv.htm (last visited Nov. 11, 2005); see also Posner, *supra* note 44, at 90–94 (providing similar information for post-1990 redistricting objections)

46. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, COMPLETE LISTING OF OBJECTIONS PURSUANT TO SECTION 3(C) AND 5 OF THE VOTING RIGHTS ACT OF 1965 (2004) (on file with the NEBRASKA LAW REVIEW).

47. Pitts, *supra* note 26, at 250 (defining vote dilution and listing examples of the types of voting changes that could result in vote dilution).

48. See *id.* at 259 (“The deterrence factor, though, represents Section 5's greatest influence in the prevention of unconstitutional voting-related discrimination.”).

49. See Michael J. Pitts, *Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 276–77 (2005).

50. By making this statement, I am not revealing any secrets of my former employer. Documents provided in submissions made by local officials are readily available to the public through a Freedom of Information Act request. In addition, the Attorney General's guidelines for implementing section 5 encourage covered jurisdictions themselves to make these documents available to the public. See 28 C.F.R. § 51.28(g)(1)–(2) (2004).

clear of anything that would raise concerns with the Attorney General.⁵¹

On the local level, this deterrence plays a greater role than it does on the congressional and statewide level, with perhaps the biggest reason for this difference being a simple numbers game. In the past, Southern white Democrats could ram through statewide redistricting legislation without consulting minority legislators.⁵² Today this cannot occur.⁵³ In many states, minority state legislators now represent a "critical mass"⁵⁴ that cannot be cowed, and, in some states, minority legislators have risen to powerful leadership positions. For example, in the post-2000 Census redistricting cycle, Georgia's legislature had thirty-four African-American members in the House and eleven African-American members in the Senate,⁵⁵ including the Senate Majority Leader.⁵⁶ These African-American legislators easily could have used their power to block passage of the state's post-2000 redistricting plans.⁵⁷

In contrast, local bodies often lack this critical mass of minority representation. Numerous county and city governing bodies have a single minority representative, often out of five or more members.⁵⁸ Many more places may have just a couple of minority representatives.

51. Pitts, *supra* note 26, at 259 (describing how "in the context of redistricting, discussion and debate at the state and local level often focuses on how the Department of Justice will view the changes made"); cf. Johnson v. Miller, 864 F. Supp. 1354, 1378 (S.D. Ga. 1994) (describing how state legislators' "only interest" in drafting a redistricting plan was to satisfy the Attorney General's preclearance requirements).

52. See, e.g., Major v. Treen, 574 F. Supp. 325, 334, 336 (E.D. La. 1983) (describing how African-American legislators were not invited to meetings concerning a statewide redistricting in Louisiana and were not represented at a conference committee considering redistricting legislation); Busbee v. Smith, 549 F. Supp. 494, 518 (D.D.C. 1982) (three-judge panel) (describing how African-Americans "were excluded from the final [legislative] decision-making process").

53. See Richard H. Pildes, *Foreward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 88 (2004) (remarking that "a substantial contingent of black elected officials, particularly in the South, now has a seat at the legislative table" and how "[t]hese black elected officials participate directly in legislative bargaining, including bargaining over issues concerning the design of representative institutions themselves") (emphasis added).

54. Grutter v. Bollinger, 539 U.S. 306, 316 (2003).

55. Georgia v. Ashcroft, 539 U.S. 461, 471 (2003). The Georgia Senate had fifty-six total members and the Georgia House had 180 total members. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 39 (D.D.C. 2002).

56. Georgia, 195 F. Supp. 2d at 42.

57. Georgia, 539 U.S. at 471 ("No Republican in either the House or the Senate voted for the plan, making the votes of the black legislators necessary for passage.").

58. For example, Texas counties have a five-member commissioners court and Mississippi counties have a five-member board of supervisors. See MISS. CODE ANN. § 19-3-1 (1999); TEX. ASS'N OF COUNTIES, ABOUT COUNTIES, <http://www.county.org/counties/structure.asp> (last visited Nov. 11, 2005).

In these locales, minority officeholders would likely be at the mercy of their majority-white boards during the redistricting process that occurs after every census. These one or two minority representatives could be easily outvoted by their majority counterparts, and, almost overnight, minority voters might lose the ability to elect the sole minority resident who sits on the local governing body—an ability that, in some cases, may have taken many years of struggle and hard-fought litigation to achieve. To put it in cliché, there's a certain safety in numbers—numbers not extant on the local level.

Of course, minority representatives can be similarly outvoted by whites on a statewide level. Indeed, this has historically occurred in the South where white Democrats intentionally erected barriers to frustrate their African-American counterparts. In this regard, Professor Issacharoff surely is correct that with the advent of two-party competition on the statewide level, there seems to be much less risk that white Democrats will join hands with white Republicans to significantly curtail minority voting strength. That said, partisan competition plays a lesser role on the local level, as competition between the major political parties has not made as great an inroad into local government in the covered jurisdictions as into statewide government.⁵⁹ Indeed, a decent number of local governing bodies do not even engage in partisan politics, as many school districts and municipalities hold nonpartisan elections.⁶⁰ All in all, the competitive party politics now evident at the state level have just not filtered down to the same extent into the local level. Therefore, on the local level, minority and white Democrats may not yet be forced to join hands because of the specter of political competition.

Congressional and statewide redistricting also has more deterrence automatically built in because a stronger likelihood exists that someone or some entity will sue to enforce the other provision of the Voting Rights Act that does so much to provide representation for minority voters—section 2.⁶¹ After congressional and statewide redistrictings are enacted, they do not pass Go and they do not collect \$200; they go directly to court.⁶² For when it comes to redistricting, both

59. DAVID LUBLIN, *THE REPUBLICAN SOUTH* 79–83 (2004) (recognizing that in many counties in the South, Republicans do not field candidates for office). It is worth noting, however, that the trend is toward an increase in Republican strength at the local level. *Id.* at 81. In addition, even though Republicans do not field candidates in many counties, they tend to field candidates in the most populous counties. *Id.*

60. *Id.* at 68 (recognizing that “many municipal and school board officials are elected on a nonpartisan basis”).

61. 42 U.S.C. § 1973 (2000).

62. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 741 (1998) (“In the post-1980 round of redistricting, roughly one-third of all redistricting was done either directly by federal courts or under the injunctive authority of the courts, and the post-1990 round saw, if any-

Democrats and Republicans appear quite willing to sue first and ask questions later, with these lawsuits often involving section 2 claims on behalf of minority voters.⁶³ And if the cynics among us doubt that the political parties really have the best interest of minority voters at heart, plenty of more credible entities stand ready to join the fray, as most of the major civil rights organizations, such as the NAACP, the ACLU, and the Lawyers' Committee for Civil Rights Under Law, have active voting rights practices.⁶⁴ In contrast, section 2 cases are much less likely to be filed when it comes to redistricting in smaller jurisdictions, particularly now that section 2 claims appear to be more difficult to win than they were a couple of decades ago.⁶⁵

Congressional and statewide redistrictings also have some built-in, extra-legal deterrents because they are highly public events. While the way the map gets drawn often results from backroom deals, the media does a pretty decent job of differentiating between winners and losers in the redistricting game and letting the public know about it.⁶⁶

thing, increased judicial intervention.") (internal quotes omitted); *see also* NAT'L COUNCIL OF STATE LEGISLATURES, ACTION ON REDISTRICTING PLANS: 2001-2004, <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action2000.htm> (last visited Nov. 11, 2005) (showing that about half of all post-2000 statewide redistricting plans were challenged in court).

63. *See* Nathaniel Persily, *Suing the Government in Hopes of Controlling It: The Evolving Justifications for Judicial Involvement in Politics*, 5 U. PA. J. CONST. L. 607, 610-11 (2003) (describing how Democrats and Republicans co-opt section 2 to achieve their partisan ends); *cf.* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 542 (2004) (describing how litigators use section 2 as a check against partisan gerrymandering).
64. *See* NAACP, REDISTRICTING PROJECT, http://www.naacp.org/departments/legal/legal_redistricting.html (last visited Nov. 11, 2005); ACLU, VOTING RIGHTS, <http://www.aclu.org/VotingRights/VotingRightslist.cfm?c=32> (last visited Nov. 11, 2005); LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, VOTING RIGHTS PROJECT, <http://www.lawyerscomm.org/projects/votingrights.html> (last visited Nov. 11, 2005).
65. Michael J. Pitts, *Congressional Power to Enforce Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 183, 205-07 (2005) (describing how, in recent years, the Court has made it more difficult for plaintiffs to prevail on a section 2 claim). Section 2 suits are most commonly filed on the local level when a jurisdiction employs an at-large, as opposed to single-member districting, method of electing representatives; indeed, section 2's greatest impact has been in this arena. *See* Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH* 378, 383-86 (Chandler Davidson & Bernard Grofman eds., 1994).
66. *See, e.g.*, David Pasztor, *Remap Foes Fire Up Legal Engines*, AUSTIN AM. STATESMAN, Nov. 16, 2003, at A1 (describing how "[f]or much of this year, Republican lawmakers fiddled with a map of Texas like it was a Rubik's Cube, trying to align blocs of voters of different colors and political inclinations into new congressional districts, hoping to ensure that more Republicans than Democrats are elected to Texas' 32 seats in the U.S. House"); *Self-Interest Sinks to New Low in State*, ATLANTA J. & CONST., Aug. 30, 2001, at 22A ("The newly drawn state House and Senate and congressional districts are the handiwork of a handful of Democratic

In short, the public receives fairly accurate and timely information about redistricting machinations at the federal and state level. Moreover, those same civil rights groups that provide litigation resources (should things go awry for minority voters) also provide resources, such as map-drawing and lobbying, during the process before a redistricting plan ends up in court. On the local level, however, the resources provided by these groups are minimal, and press coverage and public knowledge of local redistrictings rarely approaches that seen on the state level.

Finally, let's differentiate the problems of partisanship and fuzzy standards on the local level. In terms of partisanship, because less two-party competition exists on the local level, there is less chance for partisan decisions from Washington.⁶⁷ In terms of clarity of standards, the main problem with the *Georgia* decision seems to be the confusing emphasis on the trade-offs between "safe,"⁶⁸ "coalition,"⁶⁹ and "influence"⁷⁰ districts. How many influence districts would have to be drawn to offset the loss of a safe district? Of a coalition district? And how does one determine whether a newly created influence district actually provides influence or just serves as a pretext for reducing minority voting strength elsewhere? The questions become innumerable, and clear answers are rare.⁷¹

On the local level, such questions likely will be raised far less often. Again, because of the small numbers present on local governing bodies, many areas will have only a single safe district, with nary a coalition or influence district to be found. Such small numbers also present far fewer possibilities for trade-offs among different types of districts. Put more concretely, on such small bodies it will be mathematically impossible to draw the two or three or four influence districts necessary to serve as replacements for a solitary safe district.

Party leaders and operatives, drafted in secret without regard to the state's common good, its communities or the common interests among voters.").

67. At a minimum, without local competition, there is likely to be little or no intransigent partisanship. Lack of competition, however, still leaves open the possibility of collusive partisanship. See *infra* Part III (discussing the difference between intransigent and collusive partisanship).
68. A "safe" district is one where "it is highly likely that minority voters will be able to elect a candidate of their choice" who will be of the same race as the minority voters and, therefore, will provide "descriptive" representation. *Georgia v. Ashcroft*, 539 U.S. 461, 480–81 (2003).
69. A "coalition" district is one that provides an "opportunity" to elect minority voters' candidate of choice but in which there is some "risk that the minority group's preferred candidate may lose." *Id.* at 481.
70. An "influence" district is one where "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 482.
71. See Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 32–33 (2004) (describing the difficulty a court might have in analyzing trade-offs between different types of districts).

What all this means is that, at a minimum, an important question to ask going forward is this: Can we confidently conclude that conditions have changed enough on the local level so that, upon elimination of section 5, local majorities would not undertake a relatively widespread erosion of the progress made by minority voters over the last four decades, particularly the progress made in terms of descriptive representation, i.e., the election of minority candidates from "safe" minority districts? Admittedly, this query knows no empirical answer,⁷² and while it is reasonable to answer this question in the affirmative, I would suggest the time has not yet come for those voting changes, such as redistrictings, that could serve to dilute minority voting strength. So, even assuming Professor Issacharoff presents the correct view when it comes to congressional and statewide redistricting, this should lead to proposals that would amend section 5 to eliminate coverage of congressional and statewide redistrictings and to retain coverage for local redistrictings for another decennial census or two.

III. GEORGIA IS A PEACH; NEW JERSEY IS A GARDEN

Section 5 applies only to covered jurisdictions and prevents those jurisdictions from implementing any voting change that, under the totality of circumstances, would lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."⁷³ Section 2 applies nationwide and bars the use of voting practices that, under the totality of the circumstances, "result in the denial or abridgement of the right to vote."⁷⁴ In *Georgia*, the Court arguably brought these two standards into close, if not exact, conformity.⁷⁵ This, along with changes in the political dynamic in the

72. Researchers may soon be undertaking studies that will empirically answer a question such as this. See CIVIL RIGHTS PROJECT, UNIV. OF CAL., BERKELEY, "VOTING RIGHTS AND DEMOCRATIC PARTICIPATION: THE DECADE AHEAD" REAUTHORIZATION OF SECTIONS 5 AND 203 OF THE VOTING RIGHTS ACT (on file with the NEBRASKA LAW REVIEW) (calling for papers that, among other things, would assess whether section 5 has "functioned as an effective deterrent to discriminatory voting practices").

73. *Georgia*, 539 U.S. at 479–80.

74. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

75. Issacharoff, *supra* note 5, at 1727–28 (suggesting that the *Georgia* decision "bring[s] the outcome of the section 5 analysis into conformity" with section 2); cf. Donahue, *supra* note 33, at 1676–83 (suggesting that section 2 standards should help govern the administration of section 5 in a post-*Georgia* world); Pitts, *supra* note 49, at 308–12 (analogizing the section 5 "totality of the circumstances" analysis to the section 2 "totality of the circumstances" analysis). In truth, Justice O'Connor's opinion for the *Georgia* plurality is inconsistent in its description of whether the legal standards for section 2 and section 5 differ. Compare *Georgia*, 539 U.S. at 478 ("We refuse to equate a [section] 2 vote dilution inquiry with the [section] 5 retrogression standard."), with *id.* at 484 ("As Justice Souter recognized for the Court in the [section] 2 context, a court or the Department of Justice

State of Georgia, including the fact that minority voters and legislators are more active political players, causes Professor Issacharoff to ask: "[W]hat justifies the extraordinary administrative mechanism that operates to reproduce, within a compressed and rigid time frame, the protections and scope of section 2 in Georgia but not New Jersey?"⁷⁶

To respond, we must first determine what section 5 now provides minority voters that section 2 does not. Obviously, section 5 provides an extra procedural mechanism by requiring a state or local government to garner federal approval for a voting change before its implementation, whereas section 2 allows a state or local government to implement a change until blocked by a federal court.⁷⁷ In essence, this procedural mechanism provides minority voters with an automatic right to federal review. Section 5 also provides a minor substantive difference by placing the burden of proof in an action on the state or local government seeking to implement the voting change, while section 2 places the burden of proof on minority plaintiffs.⁷⁸ Put differently, section 5 allows minority voters to win cases so exceedingly close that the evidence is in equipoise.⁷⁹ Finally, section 5 provides a much greater substantive benefit in that it serves as a stronger, more

should assess the totality of circumstances in determining retrogression under [section] 5." (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020–21 (1994))).

Professor Issacharoff also criticizes the Court's pre-*Georgia* standard for determining whether a retrogression of minority voting strength has occurred—a standard delineated in the seminal case of *Beer v. United States*, 425 U.S. 130 (1976). He attacks *Beer* as a barrier that prevents coalitions of African-American and white Democrats from drawing redistricting plans favorable to the Democratic Party in general at the expense of districts that safely elect African-American voters' most highly preferred candidates (i.e., African-American, as opposed to non-African-American, Democrats). Issacharoff, *supra* note 5, at 1720–27. I think it's not worth quibbling with Professor Issacharoff's characterization of *Beer* as flawed and as having the potential to stifle coalition politics. The *Beer* interpretation of the retrogression standard no longer governs the section 5 inquiry and arguably should not govern for a number of reasons. See, e.g., Pitts, *supra* note 49, at 284–90 (asserting that the *Beer* retrogression standard created problems for the constitutionality of section 5 because it may have violated the Court's congruence and proportionality doctrine). But see generally Karlan, *supra* note 71 (criticizing the Court for abandoning the *Beer* standard).

76. Issacharoff, *supra* note 5, at 1729.

77. Compare 42 U.S.C. § 1973c (2000) (setting forth the standard for section 5), with *id.* § 1973 (setting forth the standard for section 2).

78. See *United States v. Blaine County*, 363 F.3d 897, 906 (9th Cir. 2004) (describing how section 5 places the burden of proof on state and local governments while section 2 places the burden of proof on minority plaintiffs). In my view, this burden of proof often gets over-emphasized. See *id.* (emphasizing the importance of the burden of proof in a section 5 case).

79. See *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272–76 (1994) (interpreting the phrase "burden of proof" to encompass "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose").

specific deterrent than section 2 because state and local officials know they *must* go before a federal official whereas, under section 2, state and local officials only know they *might* go before a federal official.⁸⁰

So Professor Issacharoff's question should be recalibrated: Is there a reason to provide minority voters in Georgia with an automatic right to a quick federal review, a burden of proof that allows them to carry the day in exceedingly close cases, and, most importantly, a stronger deterrent⁸¹ against the implementation of voting rules that would reduce minority voting strength, but yet not provide minority voters in New Jersey with these same protections? The flippant answer is yes, because Georgia is not New Jersey.

Georgia differs markedly from New Jersey in terms of a history of voting-related discrimination. Georgia was one of those places where literacy tests and other devices were implemented for decades with the express intent of foreclosing African-American participation in the electoral process. True, New Jersey is certainly no bastion of racial harmony, but New Jersey has never engaged in the stark, blatant, and widespread discrimination practiced for decade upon decade upon decade in Georgia. As Laughlin McDonald has noted:

While Georgia was not an anomaly [among the Southern states], no state was more systematic and thorough in its efforts to deny or limit voting and officeholding by African-Americans after the Civil War. It adopted virtually every one of the traditional "expedients" to obstruct the exercise of the franchise by blacks, including literacy and understanding tests, the poll tax,

80. Section 5 also probably provides greater protection to minority voters than section 2 because of the different benchmarks used to gauge violations of the two provisions. Section 5 requires non-retrogression from the status quo whereas section 2 requires that minority voters not be subjected to discriminatory results as measured by a hypothetical benchmark of non-dilution. See *Reno v. Bossier Parish Sch. Dist.*, 520 U.S. 471, 478–80 (1997) ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan . . . [whereas] the very concept of vote dilution implies—and, indeed, necessitates—the existence of an undiluted practice against which the fact of dilution may be measured, [and, therefore,] a [section] 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark undiluted voting practice.") (internal quotes omitted).

So, I would argue that section 5 may serve to protect some "safe" minority districts that a federal court might not necessarily order drawn so as to achieve compliance with section 2. Put more concretely (and leaving aside the question of influence or coalition districts), if a current plan has three safe minority seats out of nine total and one of those seats were completely eviscerated, there's likely to be a compelling argument that a retrogression has occurred; in contrast, if a current plan has two safe seats out of nine and a third safe seat could be drawn, there's probably going to be a less compelling argument that a section 2 violation has occurred. Of course, under both scenarios, the outcome will be determined by a fact-intensive inquiry into the totality of the circumstances.

81. Admittedly, section 2 lawsuits are much more likely to be filed on the state level than on the local level. See *supra* notes 61–65 and accompanying text. Thus, the deterrent impact of section 5 on the state level is arguably less important than on the local level.

felony disenfranchisement laws, onerous residency requirements, cumbersome registration procedures, voter challenges and purges, the abolition of elective offices, the use of discriminatory redistricting and apportionment schemes, the expulsion of elected blacks from office, and the adoption of primary elections in which only whites were allowed to vote. And where these technically legal measures failed to work or were thought insufficient, the state was more than willing to resort to fraud and violence in order to smother black political participation and safeguard white supremacy.⁸²

And even Georgia's recent history separates it from New Jersey. Just two decades ago, Georgia actually had, as head of its House redistricting committee, a man whom a three-judge federal panel found, as a point of fact, to be a "racist."⁸³ Want something more recent? How about the 1990s round of redistricting where white Democrats refused to work with African-American Democrats, resulting in the formation of an "unholy alliance" of African-American Democrats and Republicans that led to the election of more African-Americans.⁸⁴ Sure, in this most recent redistricting cycle African-American and white Democrats forged an alliance in what has now been demonstrated as a failed effort at Democratic self-preservation.⁸⁵ In that respect, the 2000 round of redistricting was truly unique because, for the first time, African-Americans in Georgia actually succeeded in forming alliances within the Democratic Party during the statewide redistricting process.

Of course, history, even recent history, can only take you so far. There would seem to be little doubt that racism in voting now amounts to something much less prevalent in Georgia than it was four or three or two or even a single decade ago. This being the case, Congress should carefully assess the changing picture in many of the covered jurisdictions and amend section 5 to reflect changed circumstances, if for no other reason than because it appears that the Supreme Court might demand that Congress do so.⁸⁶ Changing the coverage formula to reflect where discrimination has more recently occurred, making bailout (the means by which jurisdictions can escape the preclearance requirement) reasonably attainable, and limiting the types of voting changes that need federal review are, among other things, potentially necessary amendments. Moreover, while New

82. LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 2-3 (2003).

83. *Busbee v. Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982).

84. See Guinier, *supra* note 4, at 1464 n.188 (describing the phenomenon prevalent in the 1990s in which African-Americans and Republicans joined together to create "safe" African-American districts).

85. Nancy Badertscher & James Salzer, *Election 2004: Historic Shift*, ATLANTA J. & CONST., Nov. 3, 2004, at EX12 (describing how, in 2004, Republicans completed their "shocking two-year takeover" of the governorship and both chambers of the state legislature).

86. See *supra* note 26 and accompanying text.

Jersey need not be covered on a statewide basis, certain parts of New Jersey probably should be brought into the section 5 fold. For instance, Passaic County has seen plenty of instances of recent voting-related discrimination aimed at Latino voters, so it might make sense for Congress to find a way to amend section 5 to add places like Passaic to the list of covered jurisdictions.⁸⁷

History aside, there's another thing that tends to separate places like Georgia and New Jersey—the strength and salience of racially polarized voting. One of the key elements to the federal district court decisions involving the post-2000 Census redistrictings in Georgia and New Jersey was the strength of racially polarized voting. The New Jersey court found racially polarized voting to present much less of a problem than the Georgia court.⁸⁸ This is not unusual as the plain fact is that in many of the section 5 covered states, racially polarized voting still stands as a significant barrier to the success of minority candidates. For example, in New Jersey, eight of fifteen African-American legislators were elected from districts with an African-American voting age population of less than thirty percent,⁸⁹

87. See Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How Can They Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 412–13 (describing recent discrimination against Latino voters in Passaic, New Jersey).

88. Compare *Page v. Bartels*, 144 F. Supp. 2d 346, 365–66 (D.N.J. 2001) (describing the lack of strong racial bloc voting in New Jersey), with *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 88 (D.D.C. 2002) (describing how there was “credible evidence that suggests the existence of *highly* racially polarized voting”) (emphasis added). Cf. Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7, 17 (2002) (describing how “voting for state-legislative offices in New Jersey . . . was slightly racially polarized, but not nearly to a degree that would be politically or legally significant”).

89. *Bartels*, 144 F. Supp. 2d at 365.

Another potential difference between Georgia and New Jersey is the gap between the percentage of African-American legislators and the African-American population. While, in 2002, Georgia had more African-American elected officials than any other state, there was a gap of 7.9 percentage points between the percentage of African-American total population in the state and the percentage of African-American legislators. See SAMANTHA SANCHEZ, *THE INSTITUTE ON MONEY IN STATE POLITICS, MONEY AND DIVERSITY IN STATE LEGISLATURES*, 2003, at 8, 36 (2005), <http://www.followthemoney.org/press/Reports/200505111.pdf>. In contrast, in New Jersey, African-Americans actually comprised a greater percentage of the state legislature in comparison to the state as a whole. *Id.* at 56 (showing that African-Americans comprised 15.8% of the state legislature and 13.6% of New Jersey's population as a whole).

It should be noted that this data is subject to a couple of obvious criticisms. First, it makes a comparison to total population rather than citizen voting age population, the latter arguably being the more relevant comparison. Second, the data indicates that four African-American legislators in New Jersey also considered themselves to be Latino. Nonetheless, even accounting for these criticisms, the number of African-American legislators in New Jersey would be roughly proportional to the African-American citizen voting age population, and, in Georgia, there would still be an almost seven percentage point gap. See U.S. CENSUS BU-

indicating the ability of African-American candidates to attract non-African-American voters. Contrast this with Georgia where not a single one of the *forty-five* African-American state legislators was elected from a district with an African-American voting age population of less than thirty percent.⁹⁰

In the final analysis, it seems a bit rash to eliminate section 5 coverage for statewide redistricting in Georgia merely because, in one redistricting cycle, African-American and white Democrats determined that political survival trumped all else. There is a long history of racial problems in voting and a continuing problem with racial bloc voting to a degree not extant in a place like New Jersey. So it would make sense to retain section 5 coverage for Georgia's statewide redistricting for one or two more redistricting cycles. Importantly, it bears emphasizing that pointing out differences between Georgia and New Jersey absolutely should not be interpreted as an argument along the lines of "those Southerners remain horrible, incorrigible racists while those Northerners represent true racial enlightenment." It's just to say that decent reasons exist to give minority voters in places like Georgia a bit more protection, albeit not the same stringent level of protection as was provided in 1965.

IV. THE PARTISANSHIP PROBLEM

Now let's just focus on the potential for partisanship in the administration of section 5. In doing so, let's assume Professor Issacharoff correctly asserts that *Georgia* saddles section 5 with a substantive standard that does not provide for relatively clear, predictable outcomes.⁹¹ Let's further assume that this new standard makes it much easier for federal officials in Washington to cynically use section 5 for partisan gain and that federal officials will use the moral imperative of minority voting rights as a cloak for immoral partisanship in the

REAU, VOTING-AGE POPULATION AND VOTING-AGE CITIZENS (PHC-T-31), *available at* <http://www.census.gov/population/www/cen2000/phc-t31.html> (last revised Mar. 4, 2004).

90. E-mail from David J. Becker, Esq., Attorney, U.S. Department of Justice, to Author (Apr. 28, 2005) (on file with the NEBRASKA LAW REVIEW) (asserting that, since 1990, there have been no instances in which an African-American candidate was elected to the state legislature from a district with an African-American voting age population of less than thirty percent); *cf.* Brief of Amicus Curiae of Georgia Coalition for the Peoples' Agenda at 8, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (No. 02-182) (on file with the NEBRASKA LAW REVIEW) ("Of the forty blacks elected to the house and senate under the 1992 plan, all but one was elected from a majority black district. The lone exception was Keith Heard from House District 89 (forty-two percent black) . . .").
91. Issacharoff, *supra* note 5, at 1720 ("But the key challenge is whether such multifaceted inquiries defy 'reviewable administration.' Justice O'Connor does not satisfactorily come to terms with this challenge." (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 496 (2003) (Souter, J., dissenting))).

same way other provisions of the Act have been used as tools to settle partisan scores.⁹²

It seems that partisanship, section 5-style, can come in two distinct forms: “intransigent partisanship” and “collusive partisanship.” Intransigent partisanship would occur when one political party controls Washington and the other political party controls the state. For example, when Republicans control the Executive Branch of the federal government and Democrats control the statewide redistricting process in Georgia, Republicans might meritlessly object to (or delay a decision to approve) a redistricting plan for the sole purpose of forcing Democrats to draw a plan more conducive to the election of Republican candidates. In contrast, collusive partisanship would occur when the same political party controls both the Executive Branch and the statewide redistricting process, for example, when Democrats control Washington and also the state process in Georgia. In this instance, sympathetic federal Democrats might collude with state Democrats to approve a plan that might actually violate section 5.⁹³

Section 5 already includes a relatively simple solution for the problem of intransigent partisanship—it’s called a declaratory judgment action.⁹⁴ Section 5 by no means requires a submission to the Attorney General. State officials can always choose to short-circuit administrative review. If state officials look toward Washington and sense the potential for hostility to their redistricting plan from the opposing political party, state officials can go get themselves a three-judge panel in the D.C. District Court. In fact, Democrats in several states have recently done just that. In the post-2000 redistricting cycle, Democrats controlled the legislative process in Georgia. Looking northward, they saw a Republican Attorney General. So the Democrats sued.⁹⁵ The State of North Carolina, also controlled by Democrats, similarly chose a declaratory judgment action in the D.C. District Court rather than administrative preclearance by a Republican Attorney General.⁹⁶ And in the end, Democrats emerged victorious, at

92. See *supra* note 62 and accompanying text.

93. In some ways, the dichotomy of intransigent and collusive partisanship corresponds to the dichotomy previously recognized by Professor Issacharoff in the partisan gerrymandering context between the partisan gerrymandering that occurs when one political party tries to benefit at the expense of another and the “bipartisan” gerrymandering that occurs when two political parties engage in “a negotiated division of power.” See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 597–98 (2002).

94. 42 U.S.C. § 1973c (2000) (allowing covered jurisdictions to seek a declaratory judgment in the United States District Court for the District of Columbia).

95. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002).

96. *North Carolina v. Ashcroft*, C.A. No. 1:03 CV 02477 (D.D.C. 2003).

least from a section 5 standpoint, in both Georgia⁹⁷ and North Carolina.⁹⁸

True, partisans from the Executive Branch could use delaying tactics and make spurious arguments in a section 5 declaratory judgment action. However, the three-judge panels know they need to be deferential to the state's redistricting choices.⁹⁹ Thus, the judges will likely hasten the pace of litigation to ensure decisions get handed down fast enough to allow the redistricting plan to, if approved, be implemented in time for any election looming on the horizon.¹⁰⁰ In short, intransigent partisanship seems to have a simple solution—the D.C. District Court. And we'll conveniently brush aside the legal realist view that

97. *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In the end, a federal court rejected the plan enacted by Georgia Democrats because it violated one person, one vote. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

98. After engaging in discovery for the litigation, the parties agreed to end the case through administrative review. See Letter from R. Alexander Acosta, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Tiare B. Smiley, Esq., Special Deputy Attorney General, State of North Carolina (Mar. 30, 2004) (on file with the NEBRASKA LAW REVIEW).

In his essay, Professor Issacharoff notes that “the two section 5 inspired cases in the Supreme Court this past Term, arising in Mississippi and Georgia, were heavily laden with charges of partisan misuse of the preclearance provisions of the VRA.” Issacharoff, *supra* note 5, at 1714 (footnotes omitted); see also David E. Rosenbaum, *Justice Dept. Accused of Politics in Redistricting*, N.Y. TIMES, May 31, 2002, at 14 (detailing accusations that partisanship informed the Attorney General's review of Mississippi's congressional redistricting plan); Jeffrey Toobin, *Poll Position*, NEW YORKER, Sept. 20, 2004, at 61–62 (implying that partisanship informed the Attorney General's review of Mississippi's redistricting plan). But see Ralph F. Boyd, *Explanations from Justice*, WASH. POST, Mar. 27, 2002, at A20. It would seem, however, that the State of Mississippi could have avoided any problems by seeking a declaratory judgment; for some reason, the state chose not to do so and, thus, ended up having its congressional redistricting plan drawn by a three-judge panel in federal district court. See *Branch v. Smith*, 538 U.S. 254 (2003). On the other hand, *Georgia* presents somewhat of an odd case in which to imply partisan administration of section 5. After all, a panel of the D.C. District Court comprised of three Democratic appointees (Circuit Judge Harry T. Edwards, District Judge Emmet G. Sullivan, and Senior District Judge Louis F. Oberdorfer) sided with the Republican Attorney General. See *Georgia*, 195 F. Supp. 2d at 25 (listing members of three-judge panel). One of these three Democratic appointees did, however, dissent. See *id.* at 102.

99. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (asserting that districting decisions “ordinarily fall[] within a legislature's sphere of competence” because “the legislature must have discretion to exercise the political judgment necessary to balance competing interests”); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.”).

100. It is not uncommon for a federal court to expedite litigation involving a statewide redistricting plan. See, e.g., Hirsch, *supra* note 88, at 13 (describing the expedited handling of litigation involving New Jersey's post-2000 statewide redistricting). In addition to expedited litigation being used to deter spurious claims, partisans in Washington could be sanctioned under Rule 11. FED. R. CIV. P. 11.

federal courts will not be much less partisan in their redistricting decision-making.

Because a solution to intransigent partisanship is readily available, it would seem that the far more pernicious and troubling type of partisanship would be that of a collusive nature. What sort of safeguards exist to prevent the Attorney General from granting swift administrative approval to a plan that clearly violates section 5? This is essentially the scenario some have alleged occurred in the Texas congressional redistricting—the now infamous “re-redistricting” that seems to have become Texas Democrats’ version of “Remember the Alamo.” Republicans controlled the process in Texas, submitted a plan to the Attorney General, and, allegedly, the Attorney General approved it with the knowledge that the plan violated section 5.¹⁰¹

It is arguable whether or not there exists a remedy in federal court for collusive partisanship. In *Morris v. Gressette*,¹⁰² the Court held as inviolate the Attorney General’s decision to approve a change—not subject to review in any federal court.¹⁰³ But *Morris* was decided in 1977 when the composition of the Court was much different. More recently, the Court considered the Mississippi congressional redistricting where the Attorney General was alleged to have wrongfully

101. Toobin, *supra* note 98, at 62 (“When the DeLay plan was submitted to the Justice Department for approval, career officials in the Voting Section produced an internal legal opinion of seventy-three pages, with seventeen hundred and fifty pages of supporting documents, arguing that the plan should be rejected as a retrogression of minority voting rights. However, according to people familiar with the deliberations, political staff of the Voting Section exercised its right to overrule that decision and approved the DeLay plan, which is now in effect for the 2004 elections.”); see also Dan Eggen, *Democrats Won’t Get Justice Memo*, WASH. POST, Jan. 22, 2004, at A23 (reporting allegations that “career attorneys had recommended an objection to the [Texas] redistricting plan, but were overruled by political appointees”).

Allegations of partisanship are nothing new to section 5. In the 1980s, the Attorney General was accused of partisan decision-making in the approval of a congressional redistricting plan for Louisiana. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: STRUCTURE OF THE POLITICAL PROCESS* 653–63 (2d ed. 2002). More recently, the Attorney General was criticized for partisan administration of section 5 because he precleared a very stringent photo identification law. See ACLU, ACLU CONDEMNS U.S. JUSTICE DEPARTMENT DECISION TO APPROVE GEORGIA PHOTO ID LAW (2005) (on file with the NEBRASKA LAW REVIEW) (quoting the director of the ACLU Voting Rights Project as saying “[i]t is quite alarming to see such obvious political partisanship impact the fundamental voting rights of citizens of the state”).

102. 432 U.S. 491 (1977).

103. *Id.* at 506–07 (holding that the decision of the Attorney General to approve a voting change cannot be reviewed in federal court). In dissent in *Morris*, Justice Marshall recognized the possibility of collusive wrongdoing on the part of the Attorney General, noting that the majority opinion “grant[ed] unreviewable discretion to a future Attorney General to bargain acquiescence in a discriminatory change in a covered State’s voting laws in return for that State’s electoral votes.” *Id.* at 508 (Marshall, J., dissenting).

extended section 5's statutory sixty-day deadline.¹⁰⁴ In this instance, the Court upheld the Attorney General's decision to extend the deadline because the decision was "neither frivolous nor unwarranted."¹⁰⁵ So maybe in an egregious case, the Court might make room for a claim that unwarranted, overtly partisan approval decisions should be subject to some type of judicial review. True, a conservative Court would seem generally inclined to eschew opening the can of litigious worms that might come from creating an exception for even the most despicable instances of partisan decision-making. However, it's worth noting that just last term, the Court opened up a vast number of redistricting plans to litigation under "one person, one vote,"¹⁰⁶ and that the Court arguably opened this can of worms at least in part because of concerns about excessive partisanship.¹⁰⁷

Even if a federal court refused to intercede to prevent implementation of a plan precleared due to collusive partisanship, another legal remedy would probably be available to minority voters (and their partisan political allies) who had been wronged: section 2.¹⁰⁸ As previously discussed, the gap has been significantly narrowed between what amounts to a section 2 violation and what amounts to a section 5 violation.¹⁰⁹ Thus, it would seem that preclearance of a plan that clearly violates section 5 would subject state officials to the strong potential for liability under section 2. In fact, this occurred with the recent congressional redistricting in Texas. After the Attorney General approved the plan,¹¹⁰ the State of Texas faced a section 2 lawsuit in which Democratic plaintiffs incorporated many of the same arguments they were making under section 5.¹¹¹

104. See *Branch v. Smith*, 538 U.S. 254, 263–64 (2003).

105. *Id.* at 263.

106. See *Cox v. Larios*, 542 U.S. 947 (2004), *affirming* *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004). Prior to *Cox*, it appeared that a statewide redistricting plan could not be successfully challenged under one person, one vote if the overall range of deviation of the plan was less than ten percent; *Cox*, however, eliminated this "safe harbor." See *id.* at 951–52 (Scalia, J., dissenting from summary affirmance); see also Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 642 n.132 (2004).

107. *Cox*, 542 U.S. at 947–51 (Stevens, J., concurring in summary affirmance).

108. 42 U.S.C. § 1973 (2000).

109. See *supra* note 75 and accompanying text.

110. Letter from Sheldon T. Bradshaw, Principal Deputy Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to The Honorable Geoffrey S. Connor, Secretary of State, State of Texas (Dec. 19, 2003) (on file with the NEBRASKA LAW REVIEW) (interposing no objection to the state's 2003 Congressional Redistricting Plan).

111. See *Session v. Perry*, 298 F. Supp. 2d 451, 475–515 (E.D. Tex. 2004), *vacated on other grounds*, 125 S. Ct. 351 (2004). The district court rejected the section 2 claims. *Id.* at 515 (denying section 2 relief); *Henderson v. Perry*, C.A. No. 2:03 CV 354, slip op. at 45 (E.D. Tex. 2005). However, rejection of those claims has been

Lawyers, of course, focus on legal remedies as if they alone can provide the sole solution to the world's problems. What lawyers often overlook are extra-judicial incentives. These extra-judicial incentives become particularly salient in the context of a discussion of collusive partisanship in the administration of section 5. Washington, D.C., has achieved legendary status for not being a very secretive town.¹¹² Whistleblowers come forward. Leaks occur. The media swarms. Congress investigates. The plain fact of Washington is that few people would want to be the Attorney General or the Assistant Attorney General for Civil Rights¹¹³ when naked collusive partisanship occurred, and no sane lower-level counselor would want to be the scapegoat for such doings—it could be career suicide. The Assistant Attorney General for Civil Rights who engaged in such activity might be risking his or her political future; lower level counselors would potentially become political pariahs. Granted, it is by no means an omnipotent deterrent, but the nature of politics in Washington provides some modicum of protection against collusive partisanship.

Let's be honest, though, partisanship remains firmly embedded in the culture of Washington and you would have to be Captain Louis Renault to be "shocked, shocked"¹¹⁴ that something administered by the Executive Branch could have any sort of partisan tinge.¹¹⁵ But, for better or worse, partisanship remains bipartisan.¹¹⁶ While Democrats are good at yelling "not us, them" and Republicans retort "them,

appealed. Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *appeal docketed*, No. 04-10649 (U.S. June 21, 2005).

112. See CNN, GEPHARDT PREPARING TO JOIN PRESIDENTIAL RACE (Jan. 3, 2003), *transcript available at* <http://cnnstudentnews.cnn.com/TRANSCRIPTS/0301/03/lt.07.html> (quoting CNN anchor as saying "it just goes to show, there are no secrets in Washington . . .").
113. The Attorney General has delegated the administration of section 5 to the Assistant Attorney General for Civil Rights. 28 C.F.R. § 51.3 (2004).
114. CASABLANCA (Warner Bros. Studios 1942).
115. See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 674 (2002) (recognizing that "it is almost impossible to design institutions to be authentically nonpartisan and politically disinterested").
116. For example, consider this account of the Johnson Administration's enforcement of the voter registration provisions of the Act:

By early June, 1967, federal examiners had been sent to sixty southern counties. They were sent as follows: thirteen to Alabama, four to Georgia, nine to Louisiana, thirty-two to Mississippi, and two to South Carolina. However, the Justice Department refused to send any examiners to Sunflower County, home of Senator James Eastland of Mississippi. Only a very small percentage of blacks were registered there, although if many more had been they could have controlled the politics of the county.

JAMES C. HARVEY, BLACK CIVIL RIGHTS DURING THE JOHNSON ADMINISTRATION 162 (1973); see also L. Thorne McCarty & Russell B. Stevenson, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. C.R.-C.L. L. REV. 357, 383-84 (1968) (describing the Attorney General's refusal to send observers to Sunflower County

not us," both Democrats and Republicans tend to be remarkably similar in their partisanship. Thus, over the long haul, partisanship will tend to cancel itself out. In addition, partisanship, at least in section 5 review, probably can only come into play at the very margins. When the case presents a close call, surely partisan political leanings influence decision-makers in the same way partisanship influences federal judges—but only when presented with a very close case.¹¹⁷

Finally, even if Professor Issacharoff has it exactly right about partisanship in the administration of section 5, it doesn't necessarily follow that section 5 coverage has to be entirely *eliminated* for congressional and statewide redistrictings. Instead, why not just eliminate any possibility for administrative review in Washington?

and noting that a "political connection could not, of course, be proved; but the implications are obvious").

117. It also bears mentioning that one of Professor Issacharoff's key elements to a theory that partisan politics might consume section 5 review is that the South no longer can be described as a region where the Democrats represent the sole dominant political party. The assumption then is that the South will be competitive between the two major political parties for the foreseeable future. However, it's not a certainty that we haven't entered a brief period of competition in the South that will soon be replaced by a very dominant Republican Party—at least at the congressional and statewide level. State governments in Florida, Georgia, South Carolina, and Texas have now come under the complete control of the Republican Party, and other states may follow. See Ryan Woodhams, *Red State, Blue State Nonsense*, ABOUT.COM, <http://usconservatives.about.com/library/blredbluenonsense.htm> (last visited Nov. 11, 2005) (displaying map of the United States depicting which party controls the state legislature and governor in all 50 states). Democratic presidential candidates, even ones of Southern lineage, struggle to be competitive in Southern states. See Electoral Vote—2004 Election, http://www.usconstitution.net/ev_2004.html (last visited Nov. 11, 2005) (showing that Senator John Kerry lost Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia); Electoral Vote—2000 Election, http://www.usconstitution.net/ev_2000.html (last visited Nov. 11, 2005) (showing that Senator Al Gore, a native of Tennessee, also lost all these states). Democratic Senators from the South also are becoming scarce. For instance, in the 2004 election, in every open Senate seat below the Mason–Dixon line that had previously been held by a Democrat, a Republican won election. See U.S. SENATE, SENATORS OF THE UNITED STATES 1789–2005, <http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf> (last visited Nov. 11, 2005) (showing that in North Carolina, Richard Burr replaced John Edwards; in South Carolina, Jim DeMint replaced Ernest Hollings; in Georgia, Johnny Isakson replaced Zell Miller; in Florida, Mel Martinez replaced Bob Graham; and in Louisiana, David Vitter replaced John Breaux). This is not just an aberration, it's a trend. In fact, in the South, only four Democratic Senators remain—two in Arkansas, one in Louisiana, and one in Florida. See U.S. SENATE, SENATORS OF THE 109TH CONGRESS, http://www.senate.gov/general/contact_information/senators_cfm.cfm (last visited Nov. 11, 2005) (showing that the only Democratic Senators from the South are Mary Landrieu (La.), Blanche Lincoln and Mark Pryor (Ark.), and Bill Nelson (Fla.)). Sure, a return to a one-party, non-competitive South cannot be considered inevitable, but it certainly can be considered as well within the realm of possibility.

Let the states bring a cause of action before a three-judge panel in a local federal court. Let interested parties oppose section 5 approval, and set stringent deadlines for federal courts to complete this litigation and render decisions. Again, since a decent amount of congressional and statewide redistricting gets played out in federal court anyway, a process closely monitored by local three-judge federal courts would seemingly present a relatively low cost alternative that would stem most of the concerns about partisanship from Washington.

V. CONCLUSION

Professor Issacharoff has good reason to be skeptical of the motives of both political parties when it comes to decision-making about minority voting rights. The history of our democracy, particularly as it relates to African-Americans, amply demonstrates the cynicism with which both parties will use minority voters to achieve partisan ends. For years, many Democrats refused, often for blatantly racist reasons, to draw single-member districts that would elect minority candidates and allow them a seat at the legislative table. Instead, Democrats would draw districts that contained just enough minority population to elect a white, but not a minority, Democrat. Later, Republicans learned that packing minority voters into majority-minority districts had the pleasant result of creating a larger number of single-member districts that would elect Republican candidates.¹¹⁸

Partisan intrigue, however, does not constitute a compelling enough reason for section 5 to slip softly out of existence. Without question minority voters need less protection from section 5 than they did in 1965, but less protection does not necessarily mean no protection. While minority voters may now be powerful enough on a statewide level to protect their own interests without having the watchful eye of federal officials in Washington in their corner, it is not nearly as clear that minority voters have this same power on the local level. And while partisanship can represent a problem in the administration of section 5, it will probably only represent a problem at the very margins.

The looming expiration of some of the provisions of the Voting Rights Act represents an opportunity to engage in skeptical thinking about the Act. It also represents a chance to implement new ideas that would better calibrate this four-decade old statute to meet modern issues and concerns. This opportunity, however, also requires careful consideration as to whether any of the Act's protections should be scrapped.

118. See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993) (describing the different ways in which Democrats and Republicans view minority voters as useful to their political strategies).